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THE LARYNGEAL MASK COMPANY LTD.
and LMA NORTH AMERICA, INC.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

THE LARYNGEAL MASK COMPANY
LTD. and LMA NORTH AMERICA, INC.,

Plaintiffs,

v.

AMBU A/S, AMBU INC., and AMBU
LTD.,

Defendants.

AMBU A/S, AMBU INC., and AMBU LTD.,

Counterclaimants,

v.

THE LARYNGEAL MASK COMPANY
LTD. and LMA NORTH AMERICA, INC.,

Counter-Defendants.

Civil Action No. 07 CV 1988 DMS (NLS)

**EX PARTE MOTION FOR AN ORDER
PERMITTING PLAINTIFFS' TO FILE
A REPLY TO MOTION FOR AN
ORDER EXTENDING DATE TO
SERVE REBUTTAL EXPERT REPORT
OF DR. JACOB JACOBY**

[Taken Under Submission]

Honorable Nita L. Stormes

1 Plaintiffs The Laryngeal Mask Company Ltd. and LMA North America, Inc.
2 (collectively "LMA") respectfully move for an order permitting LMA to file a short reply on its
3 motion to extend the date to serve the rebuttal expert report of Dr. Jacob Jacoby. LMA states
4 the following in support of this motion:

5 On July 10, 2009 the Court ordered that it would decide LMA's motion to extend
6 without a reply or hearing absent further order. Dkt. #233, at 2. Ambu's opposition (Dkt. #246)
7 states or implies facts that bear correction and clarification in a reply. Accordingly, LMA
8 respectfully moves the Court for leave to file a short reply. If permitted, LMA would contend
9 that extending the date of Dr. Jacoby's rebuttal expert report would not delay the schedule or
10 prejudice Ambu and would correct and clarify the following facts:

11 1. Ambu did not disclose that it would conduct a survey on May 8, 2009, and its
12 expert designation made no such disclosure. *See* Culp Decl. Ex. A, at 2. LMA first learned that
13 Ambu would offer a survey when it served Mazis' expert report on June 19, 2009. LMA
14 promptly searched for its own expert and retained Dr. Jacoby on July 1, 2009.

15 2. LMA timely disclosed Dr. Jacoby as rebutting Mazis and conducting a survey on
16 July 2, 2009. *See* Culp Decl. Ex. C, at 3. LMA did not designate Dr. Jacoby as rebutting Dr.
17 Gravenstein's report on that date because Ambu did not serve Dr. Gravenstein's report until the
18 following day, July 3, 2009. LMA "reserve[d] the right to identify additional or different
19 rebuttal experts after reviewing the expert report of Nikolaus Gravenstein, which Ambu has not
20 yet submitted." Culp Decl. Ex. C, at 1.

21 3. Dr. Gravenstein's report goes beyond medical testimony and includes sections on
22 "Target Audience," "Market for Laryngeal Airway Products," and the "Impact" of statements
23 "on Intended Audience." Gravenstein Report II.D, E, G. Accordingly, the second business day
24 after serving its rebuttal expert designations, LMA informed Ambu that Dr. Jacoby would be
25 rebutting Dr. Gravenstein as well as Mazis and proposed to serve Dr. Jacoby's report along with
26 the reports rebutting Dr. Gravenstein. *See* Culp Decl. Ex. D.

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1 4. LMA did not move the Court for an extension of time on the date that it
2 designated Dr. Jacoby (July 2, 2009), because it did not know how much time would be required
3 to develop and conduct a survey and had not met and conferred with Ambu. Ambu was not
4 available to meet and confer with LMA until July 8, 2009.

5 5. Following Ambu's disagreement with the service date at the meet and confer on
6 July 8, 2009, LMA promptly moved the Court for an extension the following day, July 9, 2009.

7 6. Ambu does not dispute that conducting a proper rebuttal survey requires
8 examination of the survey one is to rebut in order to correct any deficiencies. *See* Ambu's Opp.
9 6:23-25.

10 7. Extension of the deadline would not require any change in the trial schedule and
11 Ambu would suffer no prejudice. LMA has proposed to serve Dr. Jacoby's expert report on July
12 24, 2009 and offered Dr. Jacoby for deposition on July 28, 2009, both dates of which are within
13 the current expert discovery period.

14
15 Respectfully submitted,

16 KNOBBE, MARTENS, OLSON & BEAR, LLP

17
18 Dated: July 16, 2009

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28 and LMA NORTH AMERICA, INC.

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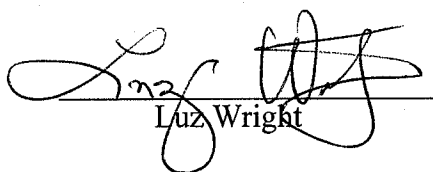
CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2009, I caused the foregoing **EX PARTE MOTION FOR AN ORDER PERMITTING PLAINTIFFS' TO FILE A REPLY TO MOTION FOR AN ORDER EXTENDING DATE TO SERVE REBUTTAL EXPERT REPORT OF DR. JACOB JACOBY** to be electronically filed with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the applicable registered filing users.

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I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Dated: July 16, 2009


Luz Wright

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